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# Altneuland: The EU Constitution in a Contextual Perspective

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The New Revision of the Old Constitution

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**THE NEW REVISION OF THE OLD CONSTITUTION**[*]

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The Conference of the representatives of the governments finally adopted in Brussels on 25 June 2004 the text of a „final draft of a Treaty establishing a Constitution for Europe“[1] (CIG 86/04 323) which is now open to ratification by the several member States of the European Union.

The legal nature of this document is as disputed among scholars, politicians and citizens as is the nature of the Union itself, the main question being of course whether and to what extent the entity „European Union“ and its pillars will be substantially modified if the new document were to become its normative basis. The claim of this paper is that, however important the changes in the legal setting may be in other respects, the Union has not been converted into something different[2]. The reason is, as it generally is — and as it will appear in the following argument —, when problems of *legal* nature are at stake, *structural*: ultimately, the Union will not be able to change its own competencies and to distribute competencies among itself and its component entities, the several Member States. And as the transition to the new treaty is overestimated in doctrinal and political discourse, the origins from the old system are underestimated for equally structural reasons: Community-Europe always had a Constitution. This makes the new document appear much less ambitious than its proud wording would have it: the new Treaty is a revision of an old Constitution, Nice-II if one likes to start with the last step, Maastricht-IV, if one prefers to date things with the introduction of the European „Union“, and even more accurate, but complicated numberings would take the combinations of the different treaty-revisions into account. It follows that whatever else one likes to see in the new document, it does not pertain to its legal nature or substance, but to wishful or frightened ideology.

To sustain this claim, it has to be shown I) that a legal system is structurally defined by the way in which it distributes highest level competencies, II) that the Draft Treaty (DT) contains no relevant structural change and III) that there are no elements outside the Treaty which would suggest a different outcome.

**I) The Constitution in the Treaties**

The use of the term „Constitution“ both in doctrinal writing before, during and after the Convention for the Future of Europe, and especially in and around this Convention has induced a great amount of confusion. A constitutional treaty has been considered as a contradiction in itself or as a completely new kind of legal category. In order to show that it is an interesting, but old phenomenon, one has to distinguish different meanings of „constitution“ A), before considering the particular case of the EU as a system of external constitutional competence B), until the stage where the new Treaty is intended to apply C).

**A) Dynamic structure**

As the expression „Constitution“ appears in a lot of different contexts, one could draw on a set of quite different if not contradictory meanings in order to propagate diverse conceptions concerning the nature

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[*] The amount of publications on European Law as on the yet not ratified new Treaty is immense. Yet in order to cope with the requirements of the publishers, my decision has been, first, to concentrate on the argument itself; second, to deliberately omit the quotation and individual discussion of the relevant literature, except for a few indications allowing the reader to easily situate the position from which I argue; third, to quote mainly the material sources which, in my view, sustain my argument, fourth, to cut not strictly indispensable parts of the argument, especially in part III. I present my apologies to the Republic of Letters.

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[1] We shall use „DTECE“ for the *Draft Treaty Establishing a Constitution for Europe*, OJEU C 169/3 18.7.2003 the document handed over by the Convention to the European Council; „FD“ for *Final Draft*, the document finally adopted by the IGC and now open for international ratification (CIG 86/04); „TECE“ for the future *Treaty Establishing a Constitution for Europe,* considered not as a text, but as a set of norms. „European Union“ will be abbreviated as EU and „European Community“ as EC.

[2] Of course, the new Union will be something different in the sense that it will legally absorb the former Union and the former European Community (Article IV-3 (new)), but not the Euratom, and that it will be endowed with legal personality, whereas it formerly only embraced the „pillars“. But neither the old Union nor the old Community are new, thus the new Union is mainly a different verbal construction of an entity which does not otherwise change as in so far as the new Treaty so provides.

of the present as of the future Union. Before the Convention, it could be argued that neither the Union nor the Communities had a *constitution* proper, that however they may claim to be entities *sui generis*, they owed there legal existence to international treaties, whereas only „States" had a constitution. Against this strand, several authors as well as the European Court of Justice itself purported that the set of institutive treaties and principled decisions of this Court already were the „Constitution of Europe"[3], even though this was not yet explicitly stated using traditional constitutionalist vocabulary.
Taking „constitution" in quite different meanings, being a „European-constitutionalist" or a „European-anticonstitutionalist" did not necessarily mean that one was or was not in favour of more or less legal Europe. Thus instead of clarifying the perplexities, the debate around the work of the Convention paradoxically upgraded the confusion. By drawing on constitutional terminology, it seems — at least verbally — to introduce a new dimension, but by doing so, either it weakens the thesis of the European-constitutionalists claiming that Europe already had a Constitution, or else it appears to weaken the assertion of the actors of the Convention, depriving them of having achieved anything else but a new wording of an old legal instrument. Anti-European-constitutionalists are angry because they fear that „Constitution" implies too much, whereas European-constitutionalists may be afraid that a „Treaty" establishing a Constitution for Europe rests on a previous stage of development.
The problem seems as important as ill-stated: to disentangle the issue, it shall be distinguished between a theoretical, a doctrinal and a political meaning of „constitution".
As a *political* concept, „constitution" means a set of norms and values a given community considers foundational irrespective of their legal or non-legal character. It can refer to certain conceptions of justice or common history or to a sense of societal solidarity or a common collective project. Strong as the impact of such conceptions may be, they don't have as such any legal normativity and will not be taken into account here. The *doctrinal* meaning of „constitution" tells us for a particular text T, which uses the word, what the term precisely means in this document. This may be a lot of different things having eventually nothing to do with even the most commonly shared beliefs about the most ordinary legal meaning of the word in a different context. It provides an account of „Constitution" as a proper name given to a certain set of norms, irrespective of what the same expression may signify elsewhere
As with other legal terms, the *theoretical* definition of „constitution" introduces a concept and can be devised arbitrarily for the sake of argument, as long as it is not contradictory in itself or void by definition or otherwise meaningless. And it will always be an easy argument to say that „constitution" as it will be used here simply does not fit this or that more or less established use favoured by other authors. The definition that will be advanced here has therefore to meet two additional requirements. It has first not to depart too much from the intuitive idea shared by otherwise opposed conceptions according to which a constitution is the most fundamental layer and the highest level of normative standards of a legal system. But it has, secondly, to give this idea a more precise and objective shape, allowing for the critical discussion of an identifiable object. It may then be that this meaning does not coincide with what the meaning of "Constitution" in the document which terms itself to be a future „Constitution for Europe", (i.e. its doctrinal meaning). But this is precisely the point. The doctrinal meaning of "Constitution" in the Treaty may be void, whereas according to the theoretical meaning, there may be a constitution even without any explicit designation.
In its legally *theoretical* sense, a constitution will be considered as being, for any legal system, the set of norms determining the legal normativity of other norms without being themselves determined by other norms of the system[4]. We may leave aside the question as to how these norms may themselves be considered valid; suffice it to say that we may have reasons to suppose them legally valid and that, by definition they don't depend themselves on other norms of the system (because in that case, those other norms would be the constitution). Such a class of norms exists necessarily for any „dynamic" system, that is, for any system, which is not enacted once and for all times but allows for modifications and concretisations, i.e. legally framed applications resulting in norms of lower level, abstraction and generality. In some legal orders however, constitutional norms can only be identified by their content, as the method of producing them is not discernible from the method to be used for producing other

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[3] This it states in the famous case *Les Verts*, 23.04.1986, or the decision 14.12.1991, I-6079 on European Economic Space, or in the decision from 28.03.1996, I-1759 on the ECHR.

[4] My position may schematically be qualified as exclusive analytic positivism. However debatable this conception may appear, the point which is developed here can be discussed in its own right and does not need to be lost in however fascinating foundational quarrels. Elements of my constitutional theory are more fully outlined in : « La révision constitutionnelle en Autriche et en Allemagne : théorie, pratique et limites », in : *La Révision de la Constitution* , Economica Paris 1993, p. 7-65; *Droit constitutionnel* (with Louis Favoreu† (ed.) et al. Précis Dalloz, Paris 2004 (7th edition), p. 31-112.

norms, for instance „primary legislation“. In most contemporary systems the constitution is, at least to a certain and variable extent, *formalised* in the sense that the production of norms relating to the material constitution are framed in a specific way, different, explicitly characterised and more difficult than other procedures of norm-production.
This definition requires some precisions and allows for some remarks.

1) The determining element in the formal constitution will be the organ entitled to modify it, i.e. who has *constitutional competence*. The type of organs empowered to change the constitution — and this may be arranged according to a lot of different parameters: partial, complete revision, revision concerning the territorial structure etc. — may thus be considered as parameters for a classification of constitutional systems.

2) One such distinction relevant to our present purpose departs between *internal* and *external* constitutional competence: in the first case the organs with constitutional competence belong exclusively to the same legal system, whereas in the second case there are at least some aspects under which they depend from another legal system. We may call this „constitutional heteronomy“ vs. „constitutional autonomy“. This distinction is usually not reflected in traditional constitutional doctrine, which unduly identifies constitution with constitutional autonomy.
3) Norms concerning constitutional competence are necessarily „primary“ norms of that system, that is other norms have to conform to these provisions in order to qualify as norms of the system.
4) Constitutional competence is the competence of distributing competencies - or *Komptenz-Kompetenz* to use a German notion. The problem we are concerned with here is less the general question of European constitutional law on the whole i.e. who has, according to the present or future Constitution competence to act in a certain domain, but mainly the issue of the *constitutional law of constitutional competence* as „competence-competence“.
5) A *revision* of the constitution is a modification of its normative content, that it, when the constitution is formalised, the procedurally determined substitution of a set of constitutional provisions by another one. This excludes both changes that are only implicit and such ones that could occur without an identifiable alteration of the text (assuming that the formalisation implies a written expression of the relevant provisions). *Revisions necessarily modify the form of the constitution.*
However, certain provisions seem to allow for the constitution being modified without the *text* appearing to have changed. This seems at first sight legally to happen[5], when the constitution allows for a change of its own provisions by acts which don‘t belong to formal constitutional law. But what so happens in fact is that a certain legal domain is placed outside the formal constitution by a constitutional provision. It follows that the acts by which the relevant provisions are subsequently changed do not change the formal constitution, even though certain of its elements *seem* to be affected by such procedures. This appears paradoxical as the text remains the same, but lacks constitutional value, whereas a revision requires the wording to be modified. The solution of the puzzle lies in the fact that the relevant provisions do not henceforth pertain to the formal constitution, as the constitution just states that certain procedures are not formally constitutional.
I shall refer to such cases as „formal declassification“ or „deconstitutionalisation“.
6) Declassification has to be distinguished from a differentiation of procedures to revise the constitution, which can e.g. be found in Austria, Spain or Switzerland or which institute different layers of constitutional law where some provisions are excluded from any form of amendment, like France, Germany or Italy[6]. In all these cases, a revision, either partial or „total“ results in a modification of the wording of the formal constitution. Declassification has further to be distinguished from formalised concretisations of constitutional provisions like organic laws or inner regulations of parliamentary assemblies. In all these cases, the formal constitution states which matters belong to a specified extra-constitutional procedure.

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[5] A classical example was art. 24 of the German Fundamental Law according to which „The Federation can transfer by legislation rights of sovereignty to international institutions“. Before the introduction of the new article 23 concerning the relations of Germany to the EU, this allowed for the attribution of competencies to the EC by ordinary explains the relatively easy way of European integration of Germany before Maastricht.

I exclude the hypotheses in which simply a normative frame is replaced by another one *outside* the rules of revision, that is of a *coup d‘Etat*.

[6] In France (art, 89, 5th paragraph) the constitutional modification of the „republican form of government“ (or of „the State“ in Italy, art. 138) is forbidden, in Germany, art. 79 (3) quotes specific provisions which are excluded from revision.

Confusions may occur, when the constitution dubs cases „constitutional revisions“ which do not result in modification of the normative content the formal constitution. The doctrinal meaning has to be distinguished from the theoretical meaning of „revision“.
One test of such a situation is that such provisions are henceforth subject to review by courts entitled to control the conformity of legal acts to the formal constitution. One can of course set forth a system in which even constitutional norms are subject to such a review, but only against such higher constitutional principles or provisions that are not themselves subject to judicial review.

**B) International constitutional competence**

Traditional constitutional theory has mainly been devised in the course of emergence of the democratic nation-states at the end of the XVIIIth century. But legally speaking, this is a contingent limitation without scientific value.
1) Material constitutional law is a necessary element of any legal system. It follows that if the European Community Community of Steal and Coal, the Economic Community, the European Community or the European Union can be considered as a legal systems, as we shall admit here without further scrutiny, than Europe necessarily had and has a constitution, whatever the concrete name of this class of norms may be. In other words, such a constitution exists since 1951. And the various modifications of the Treaties which brought the law of the European Union in its present shape do indeed result from revisions of these original constitutional norms. This implies that if the adoption of the new document as a legal basis of the Union is in continuity with previous developments of the law of the European Union, then the entry into force of the Treaty establishing a Constitution for Europe will be nothing else but a new revision of an old constitution.
2) The form by which European constitutional law is revised belongs to the international law of treaties. A problem, then, seems to consist in the fact that the document purporting to institute a „Constitution“, is a „Treaty“. Many consider this to be impossible, if not simply a conceptual contradiction. This point is indeed interesting, but does not present any real difficulty.
3) International public law is the set of norms which is produced by and applies primarily to states, that is, legal entities with certain constitutive properties (a „territory“, a „population“, a „government“ in the specific meaning of these concepts in international law). In further developments of this class of legal norms, we may find whatsoever has been legally produced by states as well as by those entities which themselves result from such legal acts. States are entitled to Nothing prevents states or such derived entities from producing legal systems endowed with a certain degree of autonomy. If a new kind of legal system is so established, and established as a dynamic system, than this new system necessarily has a constitution established by the category of norms resulting from explicit accord of addressees of public international law, i.e. a treaty. That a treaty establishes a constitution is thus not something extraordinary or problematic, but a very common phenomenon. It may be less frequent that a treaty establishes the constitution of a new state, but there is no reason why this should be legally, let alone conceptually impossible, and indeed one can easily adduce a lot of empirical examples. And as well as there is no legal impediment to create the constitution of a state by treaty, there is no legal — much less conceptual — impossibility to creating a legal entity with a lesser degree of centralisation than precisely a state.
4) This argument is in fact premised on the issue of what can conceptually be envisaged as being a *legal system*. Evidently, if only „states“ could be conceived of as such normative orders, than only states could have a constitution. Such a claim however begs the issue and seems difficult to sustain as it leaves international law and especially international organisations entirely unintelligible. As soon as one recognises that states are as such subject to legal norms and that these norms encompass not only permissions and obligations to act in a certain way, but also the authorisation to create norms and to empower new organs to create again yet other norms, one cannot simultaneously negate the legal existence of international organisations. But then, one cannot deny the legal possibility of international organisations with a high degree of centralisation, that is coming close to, but not yet identical with the degree of centralisation usually vested in the very specific type of legal system which qualifies as state. So if both legal systems qualifying as international organisations and legal systems qualifying as states can be established by international agreements, than these international agreements will by hypothesis contain the constitution of such systems, that is the set of norms which organises its future dynamics. The critical question which worries both European and (state-)constitutional lawyers is therefore where exactly to draw the boundaries between what still pertains to international law and what yet belongs to the *internal* law of a state. It is not whether a non-state-legal-order can have a constitution — as

without a constitution it would not be a legal order — but at what point a constitution makes a legal system a *state*. Legally speaking, the threshold between two such systems lies exactly where states as direct addressees and organs of public international law loose this quality. In the case of the European Union, this borderline would be crossed, when the Member-States would be deprived of their power to decide on the distribution of competencies.
It is important to see that this is a structural, not a material issue. Materially considered, one can observe a constant shift of competencies from the Member States to the EC. It is thus possible to imagine a threshold where the States would have lost the exclusive competence for any significant domain, but could still retain their constitutional competence, i.e. the capacity to modify the fundamental dynamics of European law. And one can equally envisage the opposite hypothesis where the Member States would have been attributed a materially important sphere of competencies but would have given up their constitutional competence. Whereas federal states often belong to this last hypothesis, the European Union, much to the perplexity of many observers, seems to be moving towards the first, certainly stranger setting, where the parts become on the whole weaker, but remain structurally strong at the constitutional level.
It is indeed undeniable that the European Community already is empowered with important competencies, what counts however in our present discussion is not which concrete competencies are or will be distributed to whom, but who is entitled to legally perform such a distribution, i.e. to set and to modify it. Formally considered, the norms which set this dynamic frame are stated in provisions of the founding treaties (i.e. art. 48 TEU (Nice))[7], they are to be modified only through a revision of those treaties according to the rules of public international law concerning the law of treaties; and those who are competent to enact such changes are exclusively the several Member States. Just to add an evidence, in the constitutional domain, there are no paradoxical circularities as it states the exclusive supremacy of the competence of the Member States[8].
Constitutional norms are often characterised by a high degree of rigidity in *decision*. The present rules concerning competence not only require the highest rigidity, i.e. unanimity, they impose *procedures* belonging to international public law. It is this double exigency which characterises the specificity of constitutional heteronomy in the European System. Unanimity is required in a lot of cases pursuant to the application of the Treaty, international ratification is requested for a modification of the *treaties*, and ratification by the Member States is by definition the internationally valid acceptance of the new norms by *all* States. And it is significant that all treaty revisions throughout the history of European integration maintained this same double requirement. The competence of distributing competencies is still a State competence and this it remains as long as it is not unanimously transferred to the Union.
At this point, one could consider the following objection: certainly, the European Union has not yet reached the stage of a federal state. But we have just admitted that „state“ is just one variety of a legal system on an open scale of centralisation, thus nothings prevents intermediate cases of constitutional competence, not yet strictly autonomous, but not anymore strictly heteronomous. The point is that centralisation needs not be homogenous and in the European case, constitutional competence is not yet centralised, even though several other competences are already attributed to the EC. The second point is that however a system is centralised, constitutional competence is either internal or external and the third point is that states are precisely such systems that bear internal constitutional competence. The last point is that constitutional competence can be differentiated, but not divided: if the power to amend the constitution were attributed to two sets of organs entirely related to entirely distinct systems, there would be two constitutions of two different systems.

**C) European constitutional continuity**

Concerning this borderline, nothing changed since 1951. The general rule is established by art. 96 ECSC. The procedure distinguishes the power of initiative (government of a Member State, High Authority - later Commission -), the power to call an Intergovernmental Conference (Council by two-thirds majority), the power to drat the text of the amendments (the Intergovernmental Conference, by common accord), the power to accept (the States, by ratification according to their respective

[7] And previously in Amsterdam (art. 48), Maastricht (art. N), Rome 1957 ( art. 236), Paris 1951 (art. 96).
[8] This applies even in the hypothesis of measures pursuant to art. 7, par. 3 TEU, as the decision “to suspend certain of the rights deriving from the application of this Treaty“ do not concern the modification of the Treaty itself.

„constitutional“ requirements). It may be noted that the power of the Council is not, in this respect, a power to approve, but a power to eventually stop the procedure. Majority voting may block the revision, it cannot speed it up or restrict the international competence of the Member States.
It has been mentioned several times in the debate that besides this general rule, article 95 ECSC provided for a more flexible procedure. This was indeed the case, but it concerned exclusively „the rules for the High Authority‘s exercise of power“ and it was conditioned by unforeseen difficulties in the application of the Treaty or „fundamental economic or technical changes directly affecting the common market in coal and steel“. The proposal had to be made jointly by High Authority and Council acting with five-sixth majority of its members. After scrutiny by the Court, the Assembly could approve the amendments by a majority of three quarters of the votes cast and two thirds of the members of the Assembly.
The EC Treaty included and still includes some rules by which elements of the Treaty itself can be modified without resorting to the general procedure of Treaty-revision. It concerns the number of members of the Commission (old art. 157 (2), then 213 (2), it concerned the number of judges at the ECJ (old art. 165 (4), then former art. 221 (4)), it still concerns the number of advocates general (old art. 166 (3), then 222 (3), now 222 (1), the statute of the Court (old art. 188 (2), now 245 (2)). This provision has been integrated into the DTECE (III - 289 (2)) which knows of other such possibilities to change norms of the DTECE or the annexed protocols without going through Member State ratification after an intergovernmental conference ( III - 76 (13 <2 and 3>) modification by a European law of the protocol stating complementary measures in order avoid public deficits, III - 299 (2) (Statute of the European Investment Bank)).
In terms of procedure, the rule of art. 95 ECSC Treaty was strongly conditioned and the proposal subject to preliminary review by the Court, but the final decision was left to a qualified majority. The other past or present exceptions to the strong revision procedure are not subject to factual conditions, but their domain has no direct structural incidence - they do not concern the modification and possible extension of competencies of an organ - there is no preliminary review and unanimity is required.
In the present and (at least on the basis of the text „DTECE“) future Treaty, reduced rigidity and therefore Union competence does not apply to the distribution of competencies, it is itself, where it exists, a strictly determined competence.

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To resume, a) constitutional law and international law do not as such exclude each other, the question is rather to what extent constitutional competence is internal or external, autonomous or heteronomous; b) there has always been a constitution of the European legal system and this constitution has always been a set of international treaties. According to the actual state of the law, the Constitution of the EU is still to be found in the international treaty called „Treaty on the European Union“ and it still prescribes that revisions of that treaty have to comply with the proceedings of international treaty ratification. It follows that according to the formal constitution of the EU, constitutional competence is not vested *in* the Union itself (or the Communities) but in the Member states: the present system of the EU/EC is a system of constitutional heteronomy.

**II) The revision of the revision**

The finally agreed draft of the TECE presents important and interesting modifications against the DTECE. Some of the provisions were evoked in the Convention, but not included in the Draft handed over by its Presidium to the European Council in Thessalonica on 20 June 2003. In this hitherto final stage of the eventual future legal frame of the EU, the „Constitution of Europe“ is indeed revised and this revision concerns even the rules of revision themselves. On the essential point of the previous arrangements, the new document presents however no significant modifications: the Constitution of the EU still excludes the EU from constitutional competence. But whereas the previous treaties — with the notable exception of art. 95 ECSC —, maintained a simple and homogenous system of treaty revision, the new Treaty differentiates the steps of the procedure and the organs empowered to intervene in the „ordinary“ revision A) and it distinguishes it from a new, „simplified“ procedure, which allows for internal operations concerning certain provisions under certain conditions. But even though this establishes a competence of the Union, it does not give her *constitutional* competence, it declassifies elements of the Treaty B).

**A ) Conditioned entitlement to regular revision**

It was evident, that, as long as there was by hypothesis no revolutionary process, the TECE has to be enacted and ratified according to art. 48 TEU, which means that entry into legal force requires ratification by all Member States in accordance with their respective constitutional requirements". Special provisions concerning States which would have difficulties in ratifying the new covenant were thus finally not included in the provisions concerning the ratification of this Treaty, but only for future amendments and were finally stated in a „Declaration"[9].
Both the text of the Convention and the final draft contain rules concerning the „procedure for revising the *Treaty* establishing the Constitution" or the „revision procedure" (FD). The relevant article IV-7 par. 1 mentions „the amendment of the *Treaty* establishing the Constitution" (DT), or the „amendment of this *Treaty*" as it is more soberly — and even with a more international bias — said in the final draft[10]. Art IV - 7 (3) still requires, as does the present art. 48 TEU, ratification „by all Member states in accordance with their respective constitutional requirements".
In other words, where constitutional competence is at stake, the constitutional form is the *Treaty* and the procedures required for its production, modification and destruction are those of public international law. And as long as there is no modification of art. IV - 7 (3) concerning this element, all further developments of primary EU law will remain organised by a Treaty.
This means three things: 1) the competence to enact primary EU law (constitutional competence) is vested in the Member States, 2) it is an international competence which can only be exercised by unanimous accord, 3) it is not, conversely, a competence of the Union itself or in other words, the Union still has no constitutional competence according to its own future Constitution.

The ordinary procedure is the general one in terms of constitutional competence. Everything in the Treaty, including the procedures of revision itself fall under its domain. It is a system of conditioned entitlements. The interesting aspect is that it differentiates between initiative, elaboration, and acceptance of revisions and that it operates a real redistribution of powers at the various stages preceding adoption and ratification. And whereas the adoption of the text (the determination of the amendments) and acceptance remains unchanged, the initiative and the drawing of the text is left to more flexibility and does not require unanimity. This is indeed an important shift reflecting the experience of the first and the second Convention which already took the right to present a first text away from the organ which was previously alone in charge of new provisions, namely the intergovernmental conference, which however still retains exclusively the right to determine the amendments by common accord.
The initiative still pertains equally to the Member States as such as well as to the Commission, but against the present TEU, the European Parliament is equally empowered to submit to the Council proposals for the amendment of the Treaty. That means that the representation of the Union's citizens, though still not in the position to initiate European legislation, may set the first step of a constitutional revision on a par with the States and the organ which represents the common interest of the Union. The right to start an amendment procedure is however not binding on those organs who are entitled to set the next steps. Whereas the Council conditioned by its opinion the power of its President to call an intergovernmental conference in the present system (art. 48, par. 1, second sentence), the new Treaty obligates the Council to transmit the proposals to the European Council whose position as constitutional organ becomes decisive. He chooses by simple majority whether to convene a Convention or directly an intergovernmental conference, or finally, not to go any further at all. The decision to leave or to pursue and, if so, to attribute the competence to draft to a specific organ or again to the Member States, i.e. the intergovernmental conference shapes the relevance of the new European Council as a truly constitutional organ which acts here with the highest degree of flexibility, i.e. simple majority, whereas qualified majorities or unanimity are required in many sub-constitutional domains. It is yet an as decisive as limited entitlement as he cannot himself determine a certain text, even though he „defines the terms of reference" or calls for a Convention in order to „examine the proposed amendments". The chain of conditions mandates again those other organs. The future Convention acts by „consensus" which seems to mean the historical method of decision of the first and the second college of this type. It is however clear that it has only a power of „recommendation" which is not binding on the intergovernmental conference which in any case decides „by common accord".

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[9] Declaration on the ratification of the Treaty establishing a Constitution for Europe, CIG 86/04 ADD 2, p. 72. In previous versions this was intended to be included in the treaty itself (see CONV 647/03 rty/AM/sjs, p. 14)

[10] Emphasis added.

That means that the Member States are weaker in the intermediate stage where they have much less the power to determine the path and outcome of an eventual revision, as the European Council acting as a constitutional organ of the Union may end or modify the whole setting by simple majority. Whereas he, then eventually the Convention, can veto the whole procedure, the Member States as intergovernmental conference are again, but then alone, empowered, once the preparatory stages are completed. It is still the Conference which decides the final wording and it is still the Member States who accept or reject the so agreed proposal. It follows that the apparent dissociation of drafting power and endorsing-power is more functional than relevant in terms of competence: whereas the Convention may be alone in charge of elaborating a first text, the intergovernmental conference is by no means bound to take it or to leave it. Its final competence is conditioned by decisions taken by those responsible for the previous stages, but it remains unrestricted as to the content of the amendment.
Nothing changes, once the conference has decided the final draft of the revision: the Member States are alone competent to ratify. It is again a procedure belonging to public international law, it is ultimately a case of constitutional heteronomy. It may very well be that future conventions gain a decisive weight in the political process as it may not be the case: this is a political, not a legal question.

**B) „Simplified revision" as formal declassification**

Whereas the FD ordinary revision procedure largely reflects the proposal of the Convention, the simplified procedures were explicitly rejected by the Convention, introduced by the Italian Presidency and retained by the final Conference. These methods have a limited domain and cannot be considered as revisions in a proper sense. What does indeed belong to the formal Constitution are the provisions themselves, i.e. articles IV-7a and IV-7b: they can only be modified through the ordinary revision procedure, while the norms to which they refer to and which are stated to be amenable to revision by European decisions are in fact formally declassified.
Commenting its choice to retain exclusively the now „ordinary" procedure, the Presidium of the Convention presents two arguments[11]. First, the introduction of different methods of revision would split up parts of the Constitution too closely linked to be separated. Second, the differentiation of procedures would re-open a discussion which needs to be closed. Strangely enough, the Presidium makes in the immediately following sentences a suggestion to the exact contrary, stating that „However, in order to accommodate requests for more flexible amendment procedures in some cases, the Presidium considers it preferable to provide for a streamlined amendment option (Council acting unanimously, after consultation of the European Parliament, without ratification by national Parliaments) for certain provisions of Part Three which do not affect the objectives, values or competencies of the Union"[12]. What this option should exactly consist in is not explained but seems to prefigure the solution proposed by the Italian Presidency. Both the Convention and the Presidency insist that this procedure cannot be used to extend or modify the competencies of the Union. This excludes precisely the constitutional domain.
But what happens if it is used, against the limits set by art. IV-7b, precisely in order to increase the competencies of the Union? If such acts would have to be considered as *revisions of the Treaty*, the ECJ couldn't review such decisions under art. III-270 DT. But such a view runs against the fact that the Member States can act only if a European decision has been adopted in accordance with the requirements of art. IV-7b, par. 2 and 3, which hence appear to be indeed necessary conditions of validity of the international approval. If so, the European decision can be reviewed in its own right and quashed if found to infringe the Constitution, which implies that the international approval would disappear as an act without legal basis. It is thus a case of formal declassification and not a revision of the Treaty. Certainly, the text of the set qualified as „Treaty" is modified in certain delimited parts, but what will happen with the new Treaty is precisely that these provisions are relegated to secondary norm-making.
Of course, it is a „simplified procedure" in order to modify provisions contained in the text termed „TECE" without adoption and ratification by the several Member States. Could one not consider, then, that this introduces a constitutional competence of the Union as such, that the Union is thus entitled to its autonomous formal constitutional law? This seems not to be the case. At first, procedures for which there is an internal competence of the Union are not as such constitutional. They would be so only if the norms which could be modified pursuant to this method could themselves modify constitutional

11 CONV 728/03, p. 10.
12 Ibid.

competence and if the procedure so established were either set outside any possibility of review (as belonging to the highest level of law) or reviewable at least only against the very highest principles of the Constitution. Neither of these conditions applies. At second, it is true that there is a formal procedure which is different from strictly ordinary law-making and it is true that it concerns the methods of law-making of the Union. But again, it does not concern the distribution of competencies, it does not concern the highest levels of norms concerning norm-production and it is reviewable. This is the essential point: instead of establishing a certain domain of constitutional autonomy, the „simplified revision" introduces a procedure for acts which are set below the constitutional domain as it is understood here. Instead of including a set of provisions into a higher law, it excludes a determined set of provisions from the highest levels of the law of the Union. It is undoubtedly extremely important that this domain shifts from strict international revision by which it was formally constitutional strictly speaking to a special derived procedure, but it is equally important that it is henceforth in this respect outside the strict constitutional domain, i.e. that it is formally declassified.
The „bridging-clause" of art. IV-7a allows for a modification of procedural requirements concerning legal acts pertaining to the competencies of the Union. In order to lower the exigencies, the European Council has to adopt a European decision by unanimity. This decision is conditioned by the absence of a veto from a national Parliament and by the positive consent of the European Parliament, itself to be given with special majority. The bridging competence is limited to part III and excludes acts „with military implications or those in the area of defence". It is undoubtedly a case where the Union itself is competent via one of its organs, the European Council. The decision will enter into force and will affect the content of the Treaty, but not its constitutional part as the decision is conditioned in various ways and thus open to judicial review by the Court of Justice of the EU. An act which can be annulled as infringing the „Constitution" cannot be considered as setting itself the content of the Constitution.

Constitutional competence in the strict sense remains in the ambit of public international law, that is, of constitutional heteronomy. And it clearly appears that possible alternatives were consciously rejected.

**III) The exclusion of twin norms**

If our analysis is correct, the past Constitution of Europe as well as its revision, that is the future TECE excludes the EU from constitutional competence. The only possible objection thus consists in claiming that the Constitution is not *in* but *outside* the text of the Constitution. Such a claim can only be sustained if one succeeds in showing that the norms shaping the legal system are outside the written provisions defining this legal system. This is not absurd in itself: it may simply be that the texts expressing norms lack any form of efficient application ( not just weaknesses or irregularities) and just describe an ideal world without any connection to the facts of human conduct these norms are supposed to frame, as for instance in the former communist systems. But not only would one have to show that the texts have no legal relevance, but *which* are the really relevant norms and how to identify them.

**A) Alternative-meaning-theories**

Three types of arguments are advanced in order to show that EU law is not in the text or not in the text as immanent interpretation allows to read it.
According to the first view, the legal order of Europe is not determined by the treaties, but by the ECJ who reframed competences and centralised Community law along its own conceptions. This „common-law-theory-of-European-law" faces three difficulties, even though one can easily acknowledge the fact that the Court often departed from the norms it had to apply and to guarantee. First, if it were accurate, there would be no point in producing a European Constitution as only the case-law of the Court would in any event be the European Constitution and if it would make sense to enact a TECE, it would mean that the Court were not anymore a constitutional organ. Second, it runs against the fact that the Courts jurisprudence has been explicitly integrated in the treaties as part of the *acquis*, be it the accession-treaties of new Member States or revisions of the founding treaties (TEU art 2 fifth dash). Third, it is not clear where this legal power of the Court should come from, if not from the Treaties — which runs against the thesis, or else from the mere fact that courts make law, which amounts to a spontaneous generation claim.
The second view, mainly under the heading of „multi-level-constitutionalism", draws on the already achieved integration of EU and Member States which makes a whole indiscernible one of them both. This conception may open insights at the factual and mainly political level, but it cannot eschew the

fact that the Member States are not as such legally organised by EU law, whereas they shape its institutive instruments. Otherwise it would beg the issue which is at stake, namely that European constitutional competence is already vested in organs entirely framed by EU law.
The third approach draws on the text of the Treaties and recognises their legally framing value, but contends that they should be read in an alternative way. This view embraces two strands. According to the first, a constitution is a constitution as soon as it claims to be one, especially through certain elements which constitutions usually contain, i.e. symbols, the reference to an anthem, a preamble, a solemn declaration, a charter of rights (irrespective of the legal status of these rights). This conception which is problematic as it amounts to saying that what counts legally is what lacks legal normativity. For if anthems, symbols etc. would hold such normativity, they would be ordinary provisions and would have to state what competences which organs are empowered with. But then, there would be no point to draw on symbols, anthems, etc. in the absence of normative provisions attributing constitutional competence to the Union.
The second strand takes the view that the meaning of the text is different from the one than can be deduced by even a careful analysis. It relies on a theory of ambiguity according to which the explicit wording does not reflect the meaning of a provision where certain expressions exceed the technical setting they seem to frame. Such an approach often finds itself constrained to implying that the agreed text reflects the fact that there is no real agreement reached and that there are hidden potentialities which may later come to the surface. Classical examples of this pragmatico-hermeneutical approach can be found in the successive interpretations of the Amendments to the American Constitution or of the real nature of the government (parliamentary or presidential or semi-presidential, with or without fundamental rights etc) determined by the French Constitution of 1958.
To know what range of possibilities are exactly covered by a set of expressions framing a legal provision is of course an important inquiry and the analysis of ambiguities is certainly a methodologically compelling element of such a quest. However, if one contends that a text means something opposite to what it appears to be saying, the burden of proof lies on whom makes a counterintuitive claim, and the more so, if it goes against the findings of a sufficiently careful reading. But the claim is difficult to sustain not only because it is difficult to sustain that something means something else that it appears to mean.
The European case is since its beginning subject to particulars constraints, as the most antagonist positions have to work out feasible compromises. The classical opposition between federalists and partisans of a loosely organised, mainly economic inter-State cooperation or at best a Europe of „fatherlands“ seems especially to attract strong ambiguities in the wholes of general and harmless wordings. Interestingly though, equivocalness spread mainly in the political discourse and much less in the relatively technical legal texts. More precisely, ambiguity is relatively reduced in the domain of procedures and relatively strong, when it comes to principles, the nature of the Union or Community and future objectives. The more the former are technical, the more the latter are evasive and the more they are elusive, the more they are lacking precise normative content. Treaty-revisions were the occasion to reduce ambiguity, as for instance when new accession treaties make the *acquis* binding, attributing regular legal status to what might have originally been acts without constitutional basis or even violating the constitutional framework itself.
Concerning the point of constitutional competence as constitutional autonomy, the texts are least ambiguous. It seems difficult to state that the States were not entitled to ratify revisions of the Treaty or that they were not authorised to submit proposals for its amendment. It seems equally difficult to deny that the so called „simplified revision procedure“ excludes modifications of competencies or that the Convention which could eventually be mandated to draft a text for an ordinary revision is not entitled to bypass its mandate or to organise herself a procedure for ratification outside the rules laid down in article IV-7.
Hence the claim that, contrary to the wording, the Union would already have more powers than what this interpretation has tried to establish, seems difficult to sustain. And it is particularly difficult to show that a spill-over meaning concretely and precisely implies that constitutional competence is vested not in the Member States, but in the Union and that it is shaped in a certain procedure. Not only does the text present a very low degree of ambiguity, but its successive draftings and the surrounding debates show that possible alternatives were explicitly excluded. Those who try to inflate the meaning of „Constitution“ were left with discussions about symbols deprived of legal relevance.

**B) Successive restrictions**

Different stages can be distinguished. The problem is clearly perceived during the whole conventional period as afterwards during the Intergovernmental Conferences. But whereas the debate often turned

around introducing a different way of revision which would have attributed constitutional competence to the Union, this solution is strictly rejected at all decisive steps with strong contrast between constitutional heteronomy and autonomous procedures for declassified matters. It leaves no room for ambiguity.

At a first stage, the issue is either not identified or it is addressed in the most confusing way. Until the Convention really comes to open the discussion on the final clauses, ambiguity prevails concerning the very nature of the new legal frame. Although the word „Constitution" passes easily into common parlance, it is absolutely not clear in which respect it would be different from just another treaty. When Valéry Giscard d'Estaing delivers his inaugural address to the Convention, he assigns this college a number of tasks substantially identical with the requests of the Leaken declaration. The only difference is indeed verbal and expressed in a way which shows that the notion bears mainly a symbolic and political, but not a structurally legal content: „Considering that our consensus focuses on this theme, we shall then open the way towards a Constitution for Europe". What exactly this Constitution should consist in, is not spelled out. After this ambitious sentence one can only read that „...In order to avoid any semantic quarrel, let us agree to call it today a «constitutive treaty for Europe»"[13]. It means that in order to avoid a clarification which would have pre-empted the issue and thus probably have induced a conflict and eventually the failure of the whole enterprise, a formula is chosen which can be accepted by all possible conceptions. In fact, it limits accurately the message of the previous sentence, a „constitutive treaty" being indeed nothing else than an international convention which defines a certain legal frame. But the previous treaties did exactly the same, if we leave aside whether the purported political aims were really achieved or not. What remains then, is a mission of clarification, unification and common acceptability, not a change in constitutional competence. The issue not being addressed, one could expect either that the new covenant would come closer to constitutional autonomy or that the old international structure would be maintained. Even though it seems that Giscard d'Estaing understood „Constitution" in a symbolic and political and not in a legally structural way, one could at that stage contend that the use of „Constitution" was ambiguous. And so it remained until the Convention had to settle the question[14]. The debate around constitutional competence appeared of course long before and it is not surprising that several proposals were again brought to the floor when it assumed its work. As they went into the direction of constitutional autonomy[15], the doctrinal discussion focused on the question whether a treaty could possibly be a constitution. If, in our view, the problem is ill-stated, it however highlights the issue of ambiguity which could only be decided in terms of competences and procedures.

Second, one can recall the fact that the attempts to include a provision concerning the ratification of the new treaty departing from the present art. 48 TEU and imposing an entry into force after only a certain number or proportion of national ratifications, a special meeting of the European Council in case certain States encounter difficulties in ratification, an obligation either to ratify within a certain time

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13 Quoted in : *Le Monde*, 28.02.2002.

14 Giscard's „avant-projet" (CONV 369/02) is still strictly mute on that point. Concerning the final provisions, one can just find the titles related to the revision of the Treaty, but void of any content.

15 See already the Spinelli-project, (Resolution of the European Parliament on the Draft Treaty establishing the European Union, 14th February 1984) (e.g. under: http://www.franceurope.org/pdf/projet_spinelli.pdf), art. 84, setting the revision of a „Constitution" under the procedure for „organic laws", i.e. two thirds majority of expressed votes. See Robert Badinter, CONV 317/02, art. 81: it is the proposal leading to the least rigidity in terms of constitutional autonomy, revisions are adopted by a majority of two thirds of the members the European Parliament; Brook, Freiburg Draft of a European Constitutional Treaty in: „The Birth of a European Constitutional Order", Nomos-Verlag, Baden-Baden 2001, art. 114 and 115: unanimity in Council and three quarters of the „European Congress", an organ elected by members of the national as well as of the European Parliament; Andrew Duff, CONV 234/02, art. 18; Elena Paciotti, CONV 335/02, arts. 117 (for the „Constitution" —which is to suppose, although it is not precisely determined, the more „important" provisions — drafting power to a Convention, then IGC with a majority of four fifths and ratification by a majority of States totalising two thirds of the European population), 118 (for the „Treaty", i.e. the less important part, IGC with two thirds majority of representatives and ratification by a majority of States totalising two thirds of the European population) ; Voggenhuber, ratification by three quarters of national Parliaments. Brook (CONV 325/02), art. 180: assent of EP and ratification by all Member States , Hain (CONV 345/1/02 REV 1), art. 25.

limit or to withdraw from the Union, were not integrated into either the DT or the FD[16]. The proposal made by both the "Working document" from December 4th 2002 handed over, but not endorsed by the Commission[17], Convention-member Andrew Duff[18] and the Commission[19] to split the whole ratification procedure into a first short treaty amending only art. 48 TEU and then ratifying the new Treaty according to this new procedure were not taken further on either.

It leaves not very much room for even less added value. For this to remain, one needs at least to show some hesitation concerning the meaning of the norms framing future revisions. But the only thing one can find are attempts to introduce different rules and decisions not to follow this track.
The amendments submitted to the Convention show the different strands of thought: procedural differentiation with declassification, procedural differentiation with constitutional autonomy, strict international public law procedures, cumulating international ratification and referendum, differentiation of drawing-power and power of acceptance
Not only is there a clear opposition between those who want to leave international competence and those who want to keep it, between those who want to declassify certain provisions without incidence on competencies and those who want to maintain all norms of the Treaty on a par: the fact that these issues are explicitly brought to the fore show that they are not simply solved one way or another by using the term „Constitution". Quite the contrary, these questions are discussed for their own sake without any reference to the fact that having a „Constitution" implies any consequence concerning that matter.

The third step then consisted in the restrictive position taken by the Presidium of the Convention which has thus been clearly confronted with different choices all formulated in terms of procedural rules. Replying to the diverse amendment proposals concerning the revision-clause[20], the Presidium admits in its revised draft an alternative procedure: with Convention or without Convention, leaving it to the European Council, after consultation of European Parliament and Commission, eventually the ECB, to decide by simple majority whether to follow the first or the second path. The Council has a very important power in determining this option and in defining the terms of reference for the Intergovernmental Conference. The acceptance by the Intergovernmental Conference and ratification by the Member States remains however the same as in the present TEU. The text then retained knows of no revision procedures without plain ratification.
In the comments to the draft text, the Presidium makes two statements. First he declares that he „has not taken on board the suggestion from some quarters for different methods of amendment for different parts of the Constitution (more complex for Parts One, Two and Four; less complex for Part Three), given that some of the provisions of Part Three were closely linked to the provisions of Part One and should therefore be subject to the same amendment procedure. In addition, laying down different amendment procedures for Parts One and Three would mean re-opening discussion on the structure of the Constitutional Treaty, as it would give rise to requests for certain areas of Part Three to be moved to Part One"[21].
Second, he recognises that
„However, in order to accommodate requests for more flexible amendment procedures in some cases, the Presidium considers it preferable to provide for a streamlined amendment option (Council acting unanimously, after consultation of the European Parliament, without ratification by national Parliaments) for certain provisions of Part Three which do not affect the objectives, values or competencies of the Union"[22]
Curiously, there is no trace to be found of this streamlined amendment option neither in the paper here quoted nor in the draft „adopted" (by the Convention) in Rome on July 18, 2003.

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16 See the amendment proposals to the Convention made by Duff, Dini, Helminger (p. 45), Brok, Santer et al. (p. 147), Einem (p. 149), Duff (p. 170).

17 It bears the mention: „*Feasibility Study*. Contribution To A Preliminary Draft Constitution Of The European Union Working Document. This document was produced, at the request of President Prodi in agreement with Mr Barnier and Mr Vitorino by a working party under the responsibility of François Lamoureux and made up of Marie Lagarrigue, Paolo Stancanelli, Pieter Van Nuffel, Alain Van Solinge, with the technical assistance of Marguerite Gazze

18 See Amendments p. 170, and CONV 764/03.

19 penel.051202.en.pdf

20 CONV 728/03

21 p. 10

22 Ibid.

This can only mean that the Convention was plainly aware of the question and even though having envisaged different possibilities, opted for the version finally handed over to the European Council. This can be seen as a highly significant move as Valéry Giscard d'Estaing's final presentation of the Convention's work remained at first sight very confusing, full of „constitutional" enthusiasm[23] and deprived of structural content. Presenting the architecture of the draft and before explaining how in his view the main tasks had successfully been achieved, he just says that „...the fourth Part states the usual final clauses"[24]. It is indeed usual that the final clauses of a legal document state the methods of its revision, but these final clauses could only then be seen as usual, if one did not expect any structural change. If there is still ambiguity in Giscard's discourse as it may be in the parlance of a lot of other actors, it cannot anymore concern the crucial question of constitutional competence.

But the DT is not only a response to the amendments requested by members of the Convention, it is at the same time a reply to the Commission. The working document from December 4th 2002, clearly identifies and analyses the present situation in terms of an eventual deadlock to possible changes of the future Treaty[25]. It proposes that the requirement of ratification by all Member States be *in any event* removed from the revision properly so called, except in the case of accession of new members, and it differentiates the procedures for the other hypotheses according to the supposed importance of the matter at stake[26].
In the opinion of the Commission from September 17th 2003, pursuant to art. 48 TEU[27], this approach is significantly modified towards the differentiation of procedures finally retained by the Presidency and the FD. The strong constitutional autonomy advocated in the Feasibility Study is left for traditional rigidity in matters of competence and internal flexibility in matters of policies. The Commission however explicitly states that „This state of affairs could lead to *total paralysis of the Union* and eventually to a loss of interest on the part of the Member States and citizens as regards this form of integration, in favour of less effective models of co-operation or even co-operation between only some Member States"[28]. Flexibility is called for modifications of part III, a five-sixth majority of the European Council would be necessary after approval by the „European Parliament and a favourable opinion from the Commission; unanimity would remain a requirement in cases where the proposed amendment would alter the Union's competencies or the balance between the institutions."[29]
Again, the possibility of constitutional autonomy is identified and determined in terms of precise procedures, before being kept out in favour of constitutional heteronomy.

The Italian Presidency took a different view from the Convention[30], which finally prevailed in the previously analysed FD as the last stage in this venture. Against the DT, it seems to open the way for some constitutional autonomy, but the "simplified" methods of revision apply only outside constitutional questions. Declassification is indeed an important structural issue, but the precise limitations of these procedures underscore only the same result: the revised constitution still rules out the EU from constitutional competence without any possible ambiguity. All the changes and final choices are made explicit while leaving the word „Constitution" as it stands. Contrary to the decisions concerning procedures of norm production, it is not an issue. It may mean many things outside the juridical context, in the Treaty establishing a Constitution for Europe as a legal document it cannot mean what the provisions exclude. Q.E.D.

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23 Enthusiasm is an important topic of his inaugural address, reproduced in. *Le Monde,* 28.02.2002.

24 Oral Report to the European Council in Thessalonica, 20th June, p. 4.

25 It bears the mention: „*Feasibility Study*. Contribution To A Preliminary Draft Constitution Of The European Union Working Document".

26 See the Feasibility Study. It contains a detailed draft Constitution. The provisions concerning the revision of the Treaty are to be found in Title IX, art. 101s.

27 COM (2003) 548 final.

28 Ibid. Emphasis by Commission.

29 p. 8.

30 CIG 46/03; CIG52/1/03 REV 1(en), p. 9s..